

Syarikat Promine Dungun Sdn Bhd v Perbadanan Memajukan Iktisad Negeri Terengganu

HIGH COURT (KUANTAN) — ORIGINATING SUMMONS
NO 31-126-1988
LAMIN J
27 SEPTEMBER 1989

Civil Procedure — Interim injunction — Setting aside — Allegations of conspiracy — Non-disclosure of material facts — Whether serious question to be tried — Balance of convenience — Undertaking to pay damages — Adequacy of damages — Specific Relief Act 1950, ss 20(b) & 54(f)

Companies and Corporations — Shares — Joint venture — Failure of one party to pay for allotted shares — Whether there was conspiracy

Civil Procedure — Interim injunction — Non-disclosure of material facts — Whether serious question to be tried — Balance of convenience — Undertaking to pay damages — Adequacy of damages

The defendant applied to set aside an interim injunction obtained by the plaintiff. The plaintiff and defendant had entered into a joint venture agreement ('JV agreement') in 1985 with the object of forming a joint venture company ('JV company') to undertake mining operations in the defendant's mining land ('the project'). The equity share participation was in the proportion of 49% and 51% to be subscribed by the plaintiff and the defendant respectively. The JV company was to be managed by a board of directors comprising of two nominees of the plaintiff's and three of the defendant's, and the proportion was to remain for so long as the parties held the issued and paid-up capital of 49% and 51%. The proportion of the representation was to be varied when there was a change in the shareholding so as to reflect the proportion of the shareholding. At the onset, the executive director and managing director of the JV company were the plaintiff's nominees, namely, Ismail bin Abdul Rahman ('Ismail') and Lee Shing U ('Lee') respectively.

In its application for the injunction, the plaintiff alleged that soon after the commencement of the operation of the project, the defendant conspired to take over the operation of the JV company by ousting the plaintiff's nominees. Further, they alleged that the defendant had increased its equity share participation while the plaintiff's equity was reduced from 49% to 21.5%. As a result of the breaches, the plaintiff contended that losses had been sustained and would continue to be so in terms of salaries and benefits of the plaintiff's nominees. The plaintiff maintained that if the defendant's actions were not restrained, the plaintiff and its nominees would suffer irreparable losses as they were solely relying on this project for their income.

By way of reply, the defendant claimed that at all material times the defendant was ready and able to take up its allotment of shares on all calls for capital when made. The plaintiff was either slow in taking up its allotment or was unable to do so completely. The plaintiff failed to take up the whole of its allotment and the defendant then had no option but to take up the balance of the plaintiff's allotment as well. The result was that the ratio of the shareholdings finally became 78.5% for the defendant and 21.5% for the plaintiff. The composition of the board had then to be restructured in the ratio of 3:1 so as to accord with the JV agreement. A board meeting was held on 16 March 1988 in which the question of the failure of the plaintiff

A to take up its allotment was raised. Also at this meeting, Lee resigned his position and Ismail was divested of his executive powers. The sole management of the JV company became the responsibility of the defendant.

Held, allowing the defendant's application:

(1) The plaintiff advanced various reasons to justify its failure to take up all the shares allotted but the fact remains that the ratio as on 28 February 1988 was 78.5% in favour of the defendant as against 21.5% for the plaintiff. The problems with regard to the plaintiff's participation in the JV company was brought up at the meeting at which Lee resigned his position while Ismail remained an ordinary director. This would be in line with the purport of cl 4.4 of the JV agreement as the composition of the board was to be varied so as to reflect the proportion of the respective holdings in the company. No complaint by the plaintiff was made in this regard and as Ismail remained as director, there appeared to be no breach of cl 4.4.

(2) The plaintiff also committed a non-disclosure of material facts at the time of making the application for interim injunction, especially in regard to the circumstances leading to the change in the ratio of the shareholding.

(3) There was no serious question to be tried. The plaintiff's nominees were present at every meeting and nothing of any significance was decided behind the back of the plaintiff. However, assuming that there were serious issues to be tried, the court has to decide whether the defendant would be adequately compensated if the injunction remains in force. The mining operations would cease and the JV company would suffer. The defendant and not the plaintiff would certainly have a much bigger claim in the JV company with its 78.5% shareholding. The plaintiff had quantified their claim in the statement of claim. If the plaintiff failed in its suit, there would be grave doubts whether they would be in the position to satisfy the judgment by reason that it is only a three-dollar company, and could not even pay up its own allotment of shares. Likewise, the plaintiff's undertaking to pay damages would be incapable of being fulfilled in view of the plaintiff's financial standing.

(4) The plaintiff was more concerned with the future of its two nominees for possible loss of livelihood. They were not parties to the JV agreement or to the application. Their salaries and allowances were the concern of the JV company and the plaintiff should be more concerned with seeing that the JV company continued to flourish without hindrance.

(5) The court failed to appreciate the plaintiff's allegation of conspiracy on the part of the defendant to gain control of the JV company, especially in regard to the effect relating to the share equity participation. Clause 4.8 was alleged to be breached in that the plaintiff's nomination of Ismail as managing director had not been put before the board. The conditions imposed in the nomination were an attempt to force the issue so that the nomination of Ismail to be the managing director must be accepted on those terms. Even if there was an issue to be tried, there would be adequate damages which have been quantified. Further, if the status quo was to be maintained, it would mean, in the defendant's counsel's view, that Lee would be brought back as managing director and Ismail as executive director, which would amount to asking for specific performance, which, as a contract of services, could not be done under ss 20(b) and 54(f) of the Specific Relief Act 1950.

(6) The most important consideration in the circumstances was the well-being of the JV company. The defendant had pumped into the JV company the amount of 78.5% of the share capital. With the postponing of the operations of the company and mines, certain losses would be incurred and the defendant

would more likely be the one to carry the heavier burden. The defendant's resources were in the nature of public funds and therefore public interest was at stake. It was to be expected that the defendant must have the prime consideration and interest in seeing the JV company as a going concern since they were prepared to carry on and were able to provide the financing. The balance of convenience must lie in their favour.

Cases referred to

- 1 *Cheng Hang Guan & Ors v Perumahan Farlim (Penang) Sdn Bhd & Ors* [1988] 3 MLJ 90 (reftd)
- 2 *Holiday Inns Inc & Anor v Hotel Enterprises Ltd* [1976] 1 MLJ 213 (distd)

Legislation referred to

Specific Relief Act 1950 ss 20(b), 54(f)

Wong Soon Foh for the defendant/applicant.

Bastian P Vendargon for the plaintiff/respondent.

Cur Adv Vult

Lamin J: The plaintiff, on 8 July 1988, obtained an interim injunction against the defendant and on 13 December 1988, the defendant applied to set it aside and was allowed.

The plaintiff and the defendant entered into a joint venture agreement on 10 February 1985, the object of which was to form a joint venture company (hereafter referred to respectively as 'the JV agreement' and 'JV company'). The object was to undertake mining operations in the defendant's mining land (hereafter referred to as 'the project'). The equity share participation in the initial issued share capital of the JV company was in the proportion of 49% and 51% to be subscribed by the plaintiff and the defendant respectively. The JV company was to be managed by a board of directors comprising of two nominees of the plaintiff's and three of the defendant's and the proportion of the representation was to remain for 'so long as' the parties held the issued and paid-up capital of 49% and 51%. In the event of any change in the shareholding of the parties, the proportion of the representation in the board of directors was to be varied so as to reflect the proportion of the shareholdings of the parties. At the outset, the executive director and the managing director of the JV company were the plaintiff's nominees in the person of Ismail bin Abdul Rahman and Lee Shing U respectively.

In its application for an interim injunction, the plaintiff alleged, inter alia, that soon after the commencement of the operation of the project and as the production was going to get off the ground, the defendant conspired to take over the operation of the JV company by ousting the plaintiff's nominees from the board (see paras 19, 20 and 21 of Ismail's affidavit in encl 2). Also, the defendant had by then increased its equity share participation while the plaintiff's equity was reduced from 49% to 21.5%. As a result of breaches of the JV agreement, the plaintiff contended that losses had been sustained and would continue

A to be so in terms of salaries and benefits of the plaintiff's nominees. A letter was written to the defendant outlining the problems and breaches committed by the defendant and seeking an amicable settlement by way of restoring the status quo (see exh SP7 to encl 2). The defendant replied that the JV company was running in accordance with the JV agreement (see SP8 to encl 2). The plaintiff maintained that if the defendant's actions were not restrained, the plaintiff and its nominees would suffer irreparable losses as they were solely relying on this project for their income. By way of reply, the defendant claimed that at all material times the defendant was ready and able to take up their allotment of shares on all calls for capital when made, whereas the plaintiff was either slow in taking up its allotment of shares or was unable to do so completely. The defendant was therefore forced to make an advance and when the plaintiff still failed to take up the whole of its allotment of shares except for 21.5%, the defendant then had no option but to take up the balance of the plaintiff's allotment as well, with the result that the ratio of the shareholdings finally became 78.5% for the defendant and 21.5% for the plaintiff. With this ratio of the equity share participation, the composition of the board of directors had to be restructured in the ratio of 3:1 so as to accord with cl 4.4 of the JV agreement. It was at the meeting of the board of directors held on 16 March 1988 that the question of the failure on the part of the plaintiff to take up its allotment of shares was brought up. It was also at this meeting that Lee Shing U (plaintiff's nominee) resigned his position as managing director. Ismail bin Abdul Rahman was divested of his executive powers and from that day he remained as an ordinary director. Che Ghani bin Ambak was appointed executive directors. With such majority shareholdings in the hands of the defendant, the sole management of the JV company became the responsibility of the defendant.

G After hearing the defendant, I was satisfied that the plaintiff had not been able to meet the equity share participation of 49% in the shareholdings of the JV company. The plaintiff could only contribute up to 21.5% (see encl 5A para 12(d), (f) and letter to the plaintiff dated 8 March 1988) which amounted to 322,253 shares. The plaintiff advanced various reasons to justify its failure to take up all the shares allotted to it. But the fact remains that the ratio of the shareholdings as on 28 February 1988 was 78.5% in favour of the defendant as against 21.5% for the plaintiff. This is contrary to cl 3.1 of the JV agreement and the composition of the board of directors as required by cl 4.3 of the said agreement could not anymore be insisted upon due to the operative word 'so long as the parties hereto shall hold the issued and paid-up capital of the company in the proportion set forth in cl 3.1...'. The problems in regard to the equity share participation in the JV company was brought to the attention of the board of directors at its meeting of 16 March 1988 where both the

plaintiff's nominees attended. At that meeting, the plaintiff's nominee, Lee Shing U, resigned his position of managing directorship effective forthwith while the plaintiff's second nominee in the person of Ismail bin Abdul Rahman remained as a ordinary director. This, to my mind, would be in line with the purport of cl 4.4 of the JV agreement and in the event of change in the shareholdings of all the parties, it became mandatory for the composition of the board of directors to be varied 'so as to reflect their proportion of their respective holdings in the company'. There was no complaint from the plaintiff in regard to this change in representation. Ismail might have been stripped of the executive directorship but he was still retained as director and therefore it would appear that cl 4.4 had not been breached.

The affidavit in support of the plaintiff's application for the interim injunction painted a somewhat different impression of the situation and circumstances relating to the JV company, in particular pertaining to the parties' intention to form the JV company. Firstly, the plaintiff by the aforesaid affidavit made it appear as if the defendant was not going to inject any funds as it was on an austerity drive. Nowhere in the minutes of the board of directors' meeting did there appear even a suggestion or impression that the defendant would not be able to take up the shares allotted to it. At this meeting of 2 February 1986, it was decided to make a call for capital to the tune of \$500,000 to be allotted to both the defendant and plaintiff in the proportion of 255,000 shares respectively, thus making a ratio equity participation of 51:49. It was made clear at its meeting of 11 March 1986 that the parties were to pay their respective allotment of shares in cash within a month. The defendant did so fully but not the plaintiff. Subsequently, three more calls for capital were made one after another and, accordingly, allotments were made to both the defendant and the plaintiff. The defendant paid its share of the allotments but not so the plaintiff who was even given time to pay. At the fourteenth meeting of the board held on 26 February 1988, the equation in regard to the shareholdings was made known. As of that date, the plaintiff had only paid less than half of what the plaintiff had subscribed with 412,477 shares still to be paid for. All these were not reflected by the plaintiff at the time of making its application for the interim injunction. At every meeting of the board when the decision to call for capital was made, the plaintiff's nominees were present. From the minutes, one gets the impression that the calls for capital were made in the best interest of the JV company.

Counsel for the defendant observed early in his submission that what was most objectionable in the present case was that the JV company was not made a party to the plaintiff's application for the interim injunction. He said that three separate legal entities must be maintained, namely, the plaintiff, the defendant and the JV company. He submitted that in law, an injunction must not issue

A against a party which was not a party to the application for the said order in a case where the order would operate injuriously against it, citing *24 Halsbury's Laws of England* (4th Ed) para 1045 [1]. It reads:

B The absence of persons who will benefit by an injunction will not prevent the court from granting one, but it will not be expressed so as to protect persons who are not parties to the action, nor will it be granted in the absence of parties where it would operate injuriously against them.

C If the JV company's incorporation was independent of both the plaintiff and the defendant and so also its continued existence, I would not hesitate to set aside the injunction forthwith. In the present case, the JV company is a creature of the joint efforts of both the plaintiff and the defendant, and both claim that they were acting as they did in its best interest, and therefore similar and summary treatment as given to completely independent legal entities, in my view, may not be appropriate. Furthermore, D the very instrument creating that third legal entity is the subject of scrutiny in order to ascertain the actions and non-actions of the plaintiff and the defendant and their justification for them.

E I agree with the submission of learned counsel for the defendant that there was no serious issue to be tried. The plaintiff's nominees were present at every meeting especially when Lee Shing U tendered his resignation as managing director, and Ismail was stripped of his executive powers, and when calls for capital were made and the failure on the part of the plaintiff to make payments for the shares allotted was referred to, resulting in the equity shareholdings in the ratio being different from what was initially envisaged and agreed to. In fact, nothing of any significance was decided behind the back of the plaintiff. F

G I am also of the view that the plaintiff, at the time of making the application for interim injunction, had committed a non-disclosure of material facts. This is specially so in regard to the circumstances leading to the change in the ratio of the shareholdings. When both parties were given one month in March 1986 to pay up their allotment of shares to make the ratio 51:49, the plaintiff failed to do so but not the defendant. (It was never denied that the plaintiff did make a small advance of \$30,000 at the initial stage.) This contributed to the cash flow problem of the JV company. H

I The plaintiff (para 2 of Ismail's affidavit to encl 2) stated that 'along the way the defendant had increased its equity share participation knowing fully well that the plaintiff did not have the finance to match the defendant's'. If that was so, why then was it agreed to and specifically stipulated in the JV agreement the ratio of the equity participation. The plaintiff gave the impression that it was the defendant who was intent on grabbing the shares. The plaintiff did not produce the minutes regard-

ing the calls for capital and the change in the equity of shareholdings. It cannot be denied that the plaintiff did not take up and pay the amount of shares allotted to it which can effect the fundamental features of the JV agreement.

Assuming that there are serious issues to be tried, then I shall have to decide whether the defendant will be adequately compensated in damages if the injunction remains in force until the final disposal of the case. Firstly, the effect of the order of 8 July 1988 was to stop completely the mining operations and in that event would the plaintiff suffer any damage? Most likely not and the party that would definitely be in trouble would be the JV company itself. If the plaintiff insisted, which it did, that it would incur damage because it had a stake in the JV company and in view of its shareholdings, then the defendant and not the plaintiff would certainly have a much bigger claim with its equity share participation of 78.5% as against that of the plaintiff of only 21.5%. Even if the plaintiff was to suffer damage, the claim had been quantified as shown in the statement of claim in the Kuantan High Court Civil Suit No 22-9-88, and the injunction should therefore be set aside. Related to this was the claim made by the plaintiff in respect of losses by the second and third plaintiffs as cited in the said suit. I agree they are not parties to the JV agreement and therefore they have no locus standi in the suit. If the injunction is allowed to remain in force and the plaintiff fails in its suit and the defendant has therefore to be compensated. I have grave doubts, having looked at the equation, whether the plaintiff will be in a position to satisfy the judgment made against it for the reason that it is only a three-dollar company. This is further evident by the fact that it could not even pay up its own total allotment of shares of 49%.

As was pointed out by counsel for the defendant, the undertaking by the plaintiff to pay damages to the defendant would likewise be incapable of being fulfilled in view of the plaintiff's financial standing. After having read all the affidavits, I am convinced that if the injunction was not set aside the party that would really suffer other than the defendant because of its majority shareholdings would be the JV company itself. What with the retrenchment problems, the maintenance of idle mine and machines, inability to satisfy customers with their orders for minerals under various contracts with resultant liability for damages for breaches of those contracts, the problem of restarting the mines after a long period of inactivity, in my estimation would require additional financing and I am convinced that the plaintiff would not be in a position to extend any financial assistance. Those were not even mentioned by the plaintiff. On the contrary, the plaintiff was more concerned with the future of its two nominees for possible loss of livelihood. The two nominees are not parties to the JV agreement and neither are they to the present application. They are only nominees and their

A salaries and allowances are the concern of the JV company. I should think that the plaintiff should be more concerned to see that the JV company continued to flourish without any hindrance. Instead, it was the plaintiff itself who had threatened to destroy the very substratum or framework of the JV company for failing to honour its part of the bargain in not fully subscribing to the shares as agreed, ie the 49% equity. It was made worse by its application for injunction thus injuncting the operation of the mines.

The plaintiff alleged conspiracy on the part of the defendant to gain control of the JV company by ousting the defendant's nominees in that it terminated Lee Shing U's services as managing director and Ismail's services as executive manager by the board's minutes of its meeting of 16 March 1988. Lee Shing U tendered his resignation and I here pause to note with interest that Lee Shing U had not deposed in an affidavit as to what actually happened. Neither has he deposed denying what he had said to the board of his willingness to give continued support to the JV company after tendering his resignation and the minutes of the board's meeting reads 'sementara itu mesyuarat mengambil perhatian di atas kesediaan Encik Lee Shing U untuk memberi khidmat nasihat apabila diperlukan...'. I fail to appreciate the allegation of conspiracy either for the purpose of extracting expertise, etc or to oust the plaintiff and its nominees from effective participation in the JV company especially in regard to the effect relating to the share equity participation in terms of cl 4.3 and 4.4 of the JV agreement. Clause 4.8 is also alleged to have been breached in that the plaintiff's nomination of Encik Ismail to be the managing director (exh SP9 to encl (2) dated 6 June 1988) had not been put before the board. The defendant's counsel's reply was that that was no nomination as it was a nomination with certain conditions (see letter of 3 June 1988) and the board would be entitled to reject it even if it had been put before it. But the plaintiff's counsel contended that the conditions were part of a resolution to be proposed and that the nomination was a separate matter. To me, the conditions as laid down in the letter of 3 June 1988 were an attempt to force the issue so that the nomination of Ismail to be the managing director must be accepted on those terms. However, even if there is an issue to be tried, I am inclined to take the view that there will be adequate damages which have been quantified. Counsel for the plaintiff cited the case of *Cheng Hang Guan v Perumahan Farlim (Penang) Sdn Bhd*¹ where the court dismissed the application to set aside an interim injunction against the third and fourth defendants who were developing a piece of land into a housing estate, a portion of which were found already erected with two dwelling houses occupied by the plaintiffs with a vegetable plot on which they depended for their livelihood. The learned judge decided that there were serious questions to be tried as regards the plaintiffs' claim that they

had in equity to remain in possession of the dwelling houses and he said:

... damages would not be adequate remedy as the plaintiffs had their homes in the two dwelling houses and they depended on the farm for their livelihood. It would cause greater inconvenience to the plaintiffs to interrupt them in the course of an established enterprise whereas the defendants were prevented from embarking on a new enterprise. Thus it was necessary to maintain the status quo.

The facts of the case before me are completely different. As I have said earlier, there were no serious questions to be tried, and even if there were, damages would be an adequate remedy. There is therefore no necessity to maintain the status quo. The plaintiff company had asked for the status quo to be maintained and this, in the view of the defendant's counsel, would mean bringing back Lee Shing U as managing director and Ismail as executive director. It would in fact be asking for specific performance of cl 4.8 and this, he said, could not be done having regard to ss 20(b) and 54(f) of the Specific Relief Act 1950 as this would be a contract of service. Relying on the case of *Holiday Inns Inc & Anor v Hotel Enterprises Ltd*,² the plaintiff's counsel submitted that the JV agreement was a 'management agreement' and not a contract of service. In the *Holiday Inns* case² it was quite clear that the first plaintiff entered into a management agreement solely to manage a new hotel which was then under construction and will carry the name of Holiday Inns and the defendant was to pay a management fee to the plaintiff. Whereas in our present case, both the plaintiff and the defendant entered into a joint venture agreement under which a new legal entity was to be created; I repeat, by their joint effort, and that the joint venture company was to be managed by a board of directors (cl 4.1). There was no fee to be paid by one party to the other like the *Holiday Inns* case.² The financing was to be provided by both parties on the ratio of the equity participation as agreed. The plaintiff's two nominees were on the board but were appointed to serve the JV company in the capacity of managing director and executive director respectively. Lee Shing U was appointed to provide the 'technical know-how' (see para 9 of Ismail's affidavit, encl 2). They were in fact giving their services to the JV company, not merely sitting on the board. In the circumstances, injunction ought not to have been issued. If I am wrong in my own judgment on the issue as to whether the JV agreement was a management agreement or not and that damages would not be an adequate remedy for the plaintiff in the circumstances, I must also decide as to where the balance of convenience should lie. I cannot agree with the reasoning canvassed by the plaintiff's counsel that the balance of convenience should lie in favour of the plaintiff on the ground that the defendant has diverse sources of income and economic activities, and the JV company is only one of many, while for the plaintiff or for that matter its nominees, the JV company is the sole source of income. To my mind,

A whether the defendant has diverse sources of income or not is not relevant here. The two parties entered into an agreement equally competent in law so to do and as equal partners had agreed to satisfy all the terms and conditions stated therein. Secondly, he said the success or failure of the JV agreement would not necessarily have a significant effect in the economic condition of the defendant while the failure of the JV company would almost certainly result in the economic annihilation of the plaintiff. When entering into an agreement of this kind whether one party would be annihilated or not is never and will never be of any consideration from the outset. And should they think of a remedy for such an eventuality, appropriate provisions would be spelt out in the agreement. Again the question as to whether the defendant participates in the JV company through its nominees who are pure employees while the plaintiff's participation is through its shareholders cannot be a factor to tilt the balance of convenience. For one thing, this factor was not spelt out in the agreement as a condition to affect its operation one way or another. Ill intentions on the part of the defendant's nominees cannot be assumed. It will be most improper. To my mind, the most important consideration in the circumstances of this case is the well being of the JV company, ie the creature created by the joint efforts of both parties. Secondly, it must be viewed in the light of the ratio of the equity share participation in the joint venture. In this case, by February 1988 the defendant had pumped into the JV company its allotment of shares to the amount of 78.5%. Whereas the plaintiff, though time was given, was unable to fulfill the term as agreed upon in the JV agreement to take its 49% allotment of shares. It could only take 21.5%. With the postponing of the operations of the company and the operation of the mines, therefore, losses will certainly be incurred and the defendant would more likely be the one to carry the heavier burden of liability being the greater shareholder of the two. I must also add here that the defendant's resources are in the nature of public funds. Therefore public interest is also at stake. It is only to be expected that the defendant must have the prime consideration and interest in seeing the JV company as a going concern and continue to be so and since they are prepared to carry on and they are capable of providing the financing, the balance of convenience must necessarily lie in favour of the defendants. In the circumstances, the injunction must be set aside.

Application allowed.

Solicitors: *Chooi & Co; Vendargon & Partners.*

Reported by *Yap Shao Sin*